Supreme Court, U.S.
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91-1791
No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

HUGH R. MANES,
Petitioner,
vs.
UNITED STATES DISTRICT COURT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an attorney charged with violation of two specific district court orders may be sanctioned for conduct not charged, and which conduct was expressly disavowed by the district judge as a basis for his imposition of sanctions.

2. Whether a Circuit Court of Appeals, in a sanction matter, may fashion and enforce a procedure on appeal, notice of which is not contained in the Federal Rules of Appellate Procedure nor published, nor otherwise communicated to the litigants involved or their counsel.

3. Whether, without any publication thereof, a Circuit Court of Appeals may adopt and apply a procedure that permits a trial court to file, in a matter in which the court is a party or has a personal interest, a "Memorandum" objecting to the decision of the appellate court long after the time for filing a brief and petition for rehearing had lapsed, and inducing the appellate court to reverse itself.

LIST OF PARTIES

Petitioner: HUGH R. MANES: Real-Party-in-Interest/Appellant in Wehrli v. Pagliotti, et al., Ninth Circuit Case No. 88-5831; United States District Court, Central District of California Case No. CV 86-7574-WDK. Petitioner is an attorney and was counsel for plaintiff in the underlying action.

Respondent: UNITED STATES DISTRICT COURT, Hon. WILLIAM D. KELLER, District Judge, Central District of California. Respondent was the trial judge in the underlying action.

Plaintiff: HANS H. WEHRLI was the civil rights plaintiff and prevailing party in the underlying action. He has no interest in the instant matter.

Defendants: JAMES PAGLIOTTI, et al. were defendants in the underlying civil rights action. They have no interest in the instant matter.

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No.

In the Supreme Court of the United States

October Term, 1991

HUGH R. MANES,

Petitioner,

vs.

UNITED STATES DISTRICT COURT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner HUGH R. MANES respectfully requests the United States Supreme Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed in this action on November 5, 1991.

OPINIONS BELOW

On August 1, 1991, the Court of Appeals for the Ninth Circuit filed an opinion reversing the judgment below which reversal was vacated by its order filed November 5, 1991 affirming the judgment below. The District Court issued no written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 5, 1991. A timely petition for rehearing was denied on February 3, 1992, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED[1]

The *Fifth Amendment* to the United States Constitution provides as follows: "**No person shall be** held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be **deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation."

Rule 2.5.2 of the Local Rules of the United States District Court for the Central District of California: "**No attorney shall engage in any conduct which** degrades or

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[1] Relevant portions are emphasized.

impugns the integrity of the Court or **in any manner interferes with the administration of justice** therein."

Rule 2.6.7 of the Local Rules of the United States District Court for the Central District of California: "**Any attorney found, after hearing, to be in violation of the Local Rules of this Court,** the Rules of Professional Conduct of the State Bar and decisions of any court applicable thereto, the F.R.Civ.P., F.R.Crim.P., or the F.R.App.P., **shall be subject to:**

(a) Disbarment,
(b) Suspension,
(c) Public or private reproval, and/or
(d) Monetary penalty."

Rule 27.1 of the Local Rules of the United States District Court for the Central District of California: "**The violation of or failure to conform to any of these Local Rules**, the F.R.Civ.P., F.R.Crim.P., or F.R.App.P., **shall subject the offending party or counsel to such penalties, including monetary sanctions** and/or the imposition of costs and attorneys' fees to opposing counsel, **as the Court may deem appropriate under the circumstances.**"

STATEMENT OF THE CASE

The record is crystal clear that the charges against Mr. Manes, that he had violated the court's orders, were based upon two specific incidents. At the conclusion of the underlying trial on January 29, 1988,[2] the court for the first time referred to the charges against petitioner, stating that he had deferred the charges until the conclusion of the case. The charges consisted of:

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[2] The underlying case was brought pursuant to 42 U.S.C. §1983. The district court's jurisdiction was invoked under 28 U.S.C. §1343.

"two occasions you seemingly--I say 'seemingly' advisedly because I am going to look for your explanation--you seemingly acted contrary regarding a rule of this court and an order of this court . . . .

"So let me identify the two things that give me grave concern and I'll ask you for a response.

"Last evening I made what I perceived to be an order, and that order was that you were to stay until the special verdict forms were completed. That special verdict form, I might add was being typed by my secretary . . . .

"Mr. Hirata stayed until approximately 7:30, I think it was, when the verdict form was delivered in the court, and we found that you were not here.

"It is my perception that you left without permission. I may be wrong. Certainly, you have the opportunity to inform me. If you left without permission you are going to be sanctioned.

"Number two, at 12:10 today the case was recessed for the noon hour and we had covered other matters after the jury had gone to lunch . . .

"So what I had said yesterday would be an hour and thirty minute lunch, which is not binding, certainly, became an hour and fifteen minute lunch. That was the order to be back here in an hour and fifteen minutes.

"To my knowledge, you weren't here as of 1:47 court time, and that is considerably after 1:25, and, again, was contrary to the court's

order.
"If you don't have a proper response you will again be sanctioned for that." [R.T. 86-89.][3]

No other grounds for sanctions were set forth at that or any other time. Mr. Manes was then asked:

> "The first question is: do you wish to respond at this time, given the potential criminal nature, although that isn't what I intend to pursue? If do you wish to respond, I would like to know why you absented yourself before you received the special verdict forms last night and why you were not here in a timely fashion this afternoon, both of which, in my strong view, interfered with the orderly administration of justice." [R.T. 90.]

Mr. Manes then requested a lawyer and a continuance for a full blown hearing. [R.T. 92.] Again the court asked:

> "So you don't want to tell me why you seemingly disobeyed both of my orders?" [R.T.93.]

Again Mr. Manes asked for a continuance and it was granted to Thursday, February 18, 1988. At that point Attorney Ben Margolis appeared as counsel for Mr. Manes. The matter was again continued to the 23rd day of February. In the interim, an order had been handed down

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[3] "R.T." refers to the Reporter's Transcript.

by the judge noting that the charges were based on Local Rule 2.5.2, 2.6.7 and 27.1 and pointing to the two incidents which were to be considered as the basis for sanctions. That order[4] read:

> "Local Rule 2.5.2 of this Court provides that '[n]o attorney shall engage in any conduct which . . . interferes with the administration of justice. . .' On January 29, 1988 this Court orally informed Mr. Hugh Manes, counsel for plaintiff of two instances in which the Court believed Mr. Manes to have willfully disobeyed two separate court orders. At that time this court stated that it intended to impose monetary sanctions against Mr. Manes pursuant to Local Rule 2.6.7 and 27.1 if he was unable to provide a satisfactory excuse.
>
> "Mr. Manes requested that this matter be considered at another time so that he could prepare himself and engage legal counsel. Finding the request reasonable, this Court agreed to postpone any hearing until Mr. Manes could properly prepare his case."

At the hearing the court repeated his reference to the two charges saying,

> "I gave to him on the record very clearly at the time I asked him whether he wished to address the matter personally at that time, why he didn't do what he had been ordered to do, or whether he wished to--and he stood

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[4] Minute Order, dated February 2, 1988.

> at the very podium where you are and he said I want to take this up with an attorney. I do not want to address it now." [R.T. 109.]

At that point the court began to complain of the manner in which Mr. Manes, as well as counsel for the government, had prepared instructions. Mr. Margolis responded:

> "I represent Mr. Manes, and I have had to proceed upon the basis of that, your Honor, the basis of that notice does not include all of these things about your Honor having to do their work.
> "Now if that is the reason--if that is the reason for the sanctions then that ought to be set forth. I did not understand it to be the reason for the sanctions.
>
> The Court: "That is not the reason for the sanctions.
> Mr. Margolis: "Well, then let me go on then, your Honor. Let me go on.
>
> The Court: "Yes." [R.T. 119.]

So once more it was made crystal clear that the charges were the two incidents of which the court had complained. Indeed if the court wished to include any charges other than the two incidents, it had an opportunity to include that in the charges but it specifically rejected that option.

The principal argument made by petitioner during the course of the discussion was that there was no actual interference with the court, no actual interference with the

administration of justice, citing *Roadway Express v. Piper* 447 U.S. 752, 65 L.Ed.2d 488 (1980). See R.T. 120-125 ending with:

> "And the law is, your Honor, and I hope your Honor looks at that case. It is the U. S. Supreme Court, and there has to be an interference of [sic: with] justice."
>
> The Court: "OK. I hear you on the point."

At another point in the hearing the judge turned to the question of notice and after quoting from cases he said,

> "That is what you are getting. I had attempted on the 28th and the 29th, and at our last hearing, to give you notice. I have given you time, i.e., Mr. Manes time, with the delays that we had between that day when he chose not to proceed, but you could have, and I made it abundantly clear, and today. I have given him and, also, I might say, as regards the notice, he has been given a minute order [quoted *ante*, at pp. 11-12] served upon him that indicates very clearly the basis of this particular hearing." [R.T. 143.]

The evidence presented on behalf of Mr. Manes at the hearing consisted entirely of an explanation of these two events.

At the conclusion of the hearing the court found Mr. Manes guilty of disobeying the two court orders specified above and fined him $875. [R.T. 175-176.]

An appeal was duly taken and on that appeal the only arguments that were made related to the two acts which were the subject of the sanctions.

Petitioner filed his opening brief on June 30, 1988 and no reply brief was ever filed. Counsel for petitioner waived oral argument in view of the fact that no reply brief had been filed. More than three years later, on August 1, 1991, the court issued its opinion reversing the trial judge on the grounds that,

> "Appellant's premature departure from the courthouse the previous evening had no meaningful impact on the proceedings the following morning." [Slip opinion, p. 9963; Appendix A-5]

Also as to the second ground of the charge the court held,

> "Second, the twenty minute delay caused by the appellant's late return from lunch on January 29, 1989 cannot be deemed an interference with justice. On the afternoon of January 18, 1989, appellant asked the court if he could wait at his office on call, or if his associate could take the verdict for him. The court denied these requests. Instead the court informed appellant that it would grant a fifteen minute longer than normal lunch break on January 29, 1989 but later failed to do so. Appellant had planned to use the extra 15 minutes to take care of other pressing business. Appellant's actions though not condoned did not impose a grievous delay in the proceedings. Thus, we find that

> appellant's conduct did not amount to an interference with the administration of justice." [Slip Opinion, p. 9963, Appendix A-5.]

In addition the appellate court held that the penalty had no relationship to the offense even if it had been committed:

> "Not waiting for the court to prepare a verdict form after the jury had departed and returning from lunch a few minutes late because of other pressing professional obligations does not warrant such an excessive penalty--especially where there was no interference with the administration of justice, and where a mild rebuke might have sufficed." [Slip Opinion, p. 9964. Appendix A-6.]

Thereafter on the 6th day of September, 1991, more than the 14 days allowed for petition for rehearing, the trial judge filed with the appellate court a letter together with an undated "Memorandum to District Courts" supported by a memorandum (actually a brief arguing against the trial court's decision) from his clerk objecting to the Court's opinion. The "Memorandum to District Courts" reads:

> "In the survey of the work of the Court of Appeals that was presented at the 1987 Circuit Conference, a large majority of the district judges expressed a desire for some method of advising the court of appeals when it had made a mistake in a decision.

"When the district judge who is communicating to the court of appeals is the judge whose decision was under review, there are several delicate problems to be considered. If the proposed correction is of a substantive nature, there is a danger that the district court may be placed in the position of an advocate for one side of the controversy, or may appear in that light. This problem is particularly acute when there may be further proceedings in district court. As a general matter, therefore, it is far preferable that the parties themselves raise the issue of mistakes of the court of appeals, by petition for rehearing or other appropriate means.

"There may, however, be times when the district court is aware of a mistake of the court of appeals, has reason to believe that the affected parties may not point it out, and feels that justice will be seriously disserved if the mistake is not corrected. There may also be occasions when the proposed correction is purely technical, and for that reason is unlikely to be of concern to the parties.

"On these occasions, the proper manner for the district judge to call the possible error to the attention of the court of appeals is by a letter to the members of the appellate panel, with copies to counsel. The benefits of this form of communication are clear. First, the notice to counsel avoids all of the dangers or improper appearances of

> ex parte communication. Second, there can be no question of what has actually been communicated to the court of appeals.
>
> "There are also occasions when a district judge who has had, and will have, nothing to do with a case has discovered a mistake in an opinion of the court of appeals. In that case, the district judge is as free as anyone to communicate the concern to the panel. The most useful form is still by letter to all three panel members, but other means are not precluded."

Petitioner Manes was instructed to file a response to the clerk's memorandum in which he argued,

> "Third, in its communication with the Court, Judge Keller included an undated, unidentified memorandum purporting to be justification for the communication. Even if the memorandum is an official policy of the Court, albeit unpublished and unavailable, it is evident from the content that it was not intended to authorize communications of the kind involved here. E. g., 'When the district judge who is communicating to the court of appeals is the judge whose decision was under review, there are several delicate problems to be considered. If the proposed correction is of a substantive nature, there is a danger that the district court may be placed in the position of an advocate for one side of the controversy, or may appear in that light.' See: *Reserve Mining Co. v. Lord*

> [8th Cir., 1976] 529 F.2d 181, 185: where the court shed the robe of the judge and assumed the mantle of the advocate.
>
> "This appears to be exactly the kind of communication contemplated by the 'policy' to be improper and has absolutely no relationship to the kind of 'letter' referred to. What is offered is not the correction of an alleged mistake. Rather it is a full blown argument on the law and the facts, including the inferences which it is claimed should be drawn from the facts. To permit this to be done even by a disinterested judge, let alone one who is himself the respondent in the case, is totally inconsistent with the theory and practice of appellate review."

No opportunity for oral argument was offered to counsel in this rehearing. The appellate court then set aside its former decision saying,

> "After reviewing the record, particularly the transcripts, we conclude that the district judge exercised commendable restraint in dealing with counsel for both parties. **The record establishes that counsel failed to provide the court with the assistance on jury instructions and special verdict forms that judges would normally expect from counsel.**" [Appendix B-2]

[Emphasis added.]

This was disavowed as a reason for the sanction. (See: *supra*, pp. 13-14)

REASONS FOR GRANTING THE WRIT

I

THE "MEMORANDUM TO DISTRICT COURTS" NEITHER AUTHORIZED NOR COULD CONSTITUTIONALLY AUTHORIZE THE GRANTING OF SPECIAL PROCEDURAL PRIVILEGES TO A TRIAL COURT ENGAGED IN DEFENDING ITS OWN ORDER.

Rule 10.1 provides that this Court will consider granting certiorari (a) when a federal court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision;" and (c) when a federal court of appeals "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Attorneys are faced with the necessity of filing cases and/or briefs that raise *substantial* questions of fact and/or law, or face the alternative of having sanctions imposed upon them for failing so do to. The threat of such sanctions causes attorneys to consider and to reconsider whether their client's cause meets the standards set by the courts. Inevitably attorneys are faced with the threat of sanctions more and more frequently. It follows that, when confronted with charges of sanctions, they, like their clients, are entitled to due process of law under the *Fifth* and *Fourteenth Amendments* of the Constitution of the United States.

Here, counsel was duly heard after being advised of the nature of the charges. He was found guilty. The

sanction was stayed pending an appeal.

An appeal on the said ruling was duly taken. An opening brief was filed on behalf of Mr. Manes and no reply brief was ever received. After holding the matter in abeyance for approximately three years the Ninth Circuit Court of Appeals having only the appellant's brief before it, reversed the judgment of the trial court and held that the motion for sanctions had not been sustained. After expiration of the time for rehearing, a brief prepared by the clerk of the trial judge was filed in opposition to the decision that had been rendered. That brief charged Mr. Manes with violations with which he had never been charged before. The Ninth Circuit directed counsel for Mr. Manes to file a brief in opposition to the brief filed on the court's behalf by his clerk. Such a brief was filed making two essential points. First, the procedure being followed was absolutely unique and no precedent or authority was cited in its favor other than a letter that stated that the rule had been adopted by the Ninth Circuit that a trial judge might comment on any decision which had been rendered in a case before that judge[5].

And second, that Mr. Manes' alleged conduct did not interfere with the administration of justice. Here the petitioner was sanctioned by a trial court on specified grounds. He was charged with leaving the courtroom before receiving a copy of the proposed verdict form from

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[5] While neither counsel nor his client have any knowledge of the basis for the secret rule, it seems probable that the rule was adopted to permit the court, in cases in which it was not involved, to call to the attention of the appellate court any important facts that had been overlooked by the court on appeal.

the court. He was further charged with returning to court approximately 20 minutes late after a noon break. In both instances it is asserted that by his conduct counsel delayed the process of the trial. At the hearing before the trial judge he was found guilty of having violated the court's orders and was fined $875.00.

The points being urged on this petition are exceedingly simple. First, plaintiff at all times has followed the published, accepted procedure. That procedure resulted in a reversal. Thereafter, a procedure not sanctioned by law, not known to petitioner or to counsel generally was followed and resulted in the reversal of its own decision by the court and in the sustaining of the trial court.

The memorandum of the clerk sought to review the evidence and to seek a reversal upholding the trial judge's sanction order. On its face, it violated rather than followed the "Memorandum to District Courts." It deliberately placed the judge in the position of being an advocate for his own order. This would have been entirely appropriate if it had been included in a reply brief on appeal. It did not purport to be nor was it timely as a petition for reconsideration.

The court openly placed itself in the position of "an advocate for one side of the controversy." Instead of trying to correct an error, it urged reconsideration of the decision already rendered. There was simply a failure of the trial judge to address the issues by a brief as a party to the proceeding.

The rule was intended to deal with situations where "the district court is aware of a mistake of the court of appeals, has reason to feel that the affected parties may not point it out and feels that justice will be seriously disserved if the mistake is not corrected." In making the correction the Memorandum points out the danger of even

appearing to be partisan. In this case is there any possible view of the court's action other than that it was an advocate seeking a reversal of the decision the appellate court had rendered?

The right of the trial court to comment on a case when the sanction order of the court is at issue--a right not given to the litigant--clearly violates the due process clause of the *Fifth Amendment*. To construe the "Memorandum" as giving the court the right to file a full blown brief--not just comment on some factual or technical error--makes the case even worse.

II

THE REVERSAL WAS ORDERED ON A CHARGE NEVER MADE.

Petitioner was found responsible for sanctions on the basis of charges never made by the court or anyone else. The law clerk's brief to the Ninth Circuit attacked its opinion with the assertion that Mr. Manes had failed to give adequate assistance with jury instructions. Accordingly, the court reversed itself and affirmed the judgment of sanctions originally ordered by the trial court.

If such a conviction can stand then the practice of law has indeed become a dangerous and treacherous venture. For here, the denial of due process of law under the *Fifth Amendment* is clear.

As this Court has said in many diverse ways, some principles of justice "are so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Commonwealth of Massachusetts*, 341 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1933)

Among those immutable principles of justice is that iterated by a unanimous Court in *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 4 L.Ed.2d 654, 659 (1960), that a "'conviction upon a charge not made

would be sheer denial of due process,'" quoting *De Jonge v. State of Oregon*, 299 U.S. 353, 362, 57 S.Ct. 255, 259, 81 L.Ed. 278, 282 (1937).

In *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed. 644, 647 (1948), this Court unanimously iterated the same principle thusly:

> "It is as much a violation of due process to send an accused to prison following a charge on which he was never tried as it would be to convict him upon a charge that was never made."

Thus, "'the root requirement' of the Due Process Clause" is that a deprivation of life, liberty or property must be preceded by notice and a reasonable opportunity to be heard. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 84 L.Ed.2d 494, 503 (1985).

The foregoing principles apply here. Indeed, no other cases have been found with such an absolute denial of due process as has been presented with such clarity by the record in this case.

No notice was ever given of the charges on which the sanctions were imposed; and there was never a hearing held concerning those charges.

Furthermore, the principles above cited protect lawyers no less than lay persons.

As early as 1868, this Court was called upon in *Ex parte Bradley*, 7 Wall. 364, 372-373, 19 L.Ed. 214, 217 (1868), to review a judge's finding of a lawyer in contempt based on uncharged conduct.

> "The judges admit that the rule to show cause . . . called upon him to answer simply for the act and conduct specified as for a contempt; yet they insist that after the return of the [defendant attorney] to the rule in

> answering the contempt, they had a right in considering the answer, if any other offense appeared therein cognizable by the court, it was competent to take notice of it, and inflict punishment accordingly.
>
> "We cannot assent to this view. It assumes the broad proposition, that the attorney may be called upon to answer an offense specified and, when the answer comes in, without any further notice or opportunity of defense or explanation, punish him for another and distinct offense. Certainly no argument can be necessary to refute such a proposition. It violates the commonest and the most familiar principles of criminal jurisprudence."

More recently, the Fifth Circuit in *Skinner v. White*, 505 F.2d 685 (5th Cir., 1974), reversed sanctions imposed on a litigant for alleged fraud upon the Court. Said the Court:

> "As we have observed appellee's show cause motion made no mention of the fraud on the court charge; rather it was introduced for the first time during the hearing itself. This is constitutionally inadequate notice violative of appellant's rights under the due process clause of the *Fourteenth Amendment*. The proposition that reasonable notice is one of the indispensable elements of due process requires no citation. And of course, an alleged contemnor is entitled to the protection of the due process clause. *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct.

390, 69 L.Ed. 767 (1925)."
Skinner, *supra*, at p. 690.

In the present case, petitioner never received notice, although the discussion during the hearing ranged widely over a number of issues, including those on which the appellate court held on appeal for the first time that petitioner was guilty and subject to sanctions. On rehearing it was held the "the record establishes the counsel failed to provide the court with the assistance on jury instructions of special verdict forms that judges would normally expect from counsel," an issue which petitioner did not address because, as the trial judge asserted, it was outside the issues that were tried. [Appendix B-2]

Here there was no lack of clarity in the notice. In fact the notice specifically pointed to acts against which the petitioner did prevail on appeal. It was only when other acts rejected by the trial court as a basis for sanctions were brought into the picture that the court's findings below were sustained. Such a patent violation of due process should not be countenanced by this Court.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

DATED: May 1, 1992

Respectfully submitted,

BEN MARGOLIS

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HANS H. WEHRLI,
Plaintiff,

v.

JAMES PAGLIOTTI; CITY OF LOS ANGELES, et al.,
Defendants-Appellees,

HUGH R. MANES, Esq.,
Real-party-in-interest-Appellant.

No. 88-5831
D.C. No. CV-86-7574-WDK
OPINION

Appeal from the United States District Court
for the Central District of California
William D. Keller, District Judge, Presiding

Submitted June 3, 1991*
Pasadena, California

Filed August 1, 1991

Before: Alfred T. Goodwin, Harry Pregerson and Arthur L. Alarcon, Circuit Judges.

Opinion by Judge Pregerson

*The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

SUMMARY

Courts and Procedure/Attorneys

Reversing a district court judgment imposing a monetary sanction on counsel, the court of appeals held that the sanction was unwarranted absent a clear interference with the administration of justice.

Appellant Hugh R. Manes, an attorney in the underlying action, was monetarily sanctioned by the district court for allegedly interfering with the administration of justice. The district court found that Manes had willfully disobeyed two separate court orders by not waiting while the court prepared a verdict form and by returning from lunch twenty minutes late.

[1] The record showed that Manes' conduct did not amount to a violation of the court's local rules. Manes' failure to wait during the evening hours for the court to prepare a verdict form did not interfere with the administration of justice. **[2]** Manes did not compromise the administration of justice, nor delay proceedings, by returning the next morning to review and approve the verdict form. His premature departure from the courthouse the previous evening had no meaningful impact on the proceedings the following morning. **[3]** In addition, Manes' late return from lunch could not be deemed an interference with justice. Manes' actions, although not condoned, did not impose a grievous delay in the proceedings.

[4] Even if Manes' conduct was a violation of the local rules, the sanction imposed by the district court was unwarranted. **[5]** The sanction was not necessary for the court to carry out the conduct of its business. **[6]** The sanction of $875 was not in proportion to the offense. **[7]** The conduct had to amount to recklessness, repeated disregard of court rules, gross negligence, or willful misconduct. The district court's

authority to impose sanctions for violation of local rules should be reserved for serious breaches, not thoughtless conduct.

COUNSEL

Ben Margolis, Litt & Stormer, Los Angeles, California, for the real party in interest-appellant.

Norman N. Hirata, Deputy City Attorney, Los Angeles, California, for the defendant-appellee.

OPINION

PREGERSON, Circuit Judge:

The district court imposed a monetary sanction against Attorney Hugh R. Manes ("Appellant") for allegedly interfering with the administration of justice. We find the sanction unwarranted and reverse.

BACKGROUND

Appellant was the attorney for plaintiff Hans H. Wehrli in a civil rights case against the City of Los Angeles. During trial, the district court imposed a monetary sanction against the appellant under U.S. Central District Local Rules 2.6.7[1] and 27.1.[2] The district court did so because it believed that

[1]Local Rule 2.6.7 states: "An attorney found, after hearing, to be in violation of the Local Rules of this Court, . . . shall be subject to . . . Monetary penalty."

[2]Local Rule 27.1 states: "The violation of or failure to conform to any of these Local Rules, . . . shall subject the offending party or counsel to such penalties, including monetary sanctions and/or the imposition of costs and attorneys' fees to opposing counsel, as the Court may deem appropriate under the circumstances."

appellant had violated Local Rule 2.5.2[3] by interfering with the administration of justice.

On February 23, 1988, the district court held a hearing on its order to show cause regarding imposition of sanctions against appellant. The district court found that appellant had "willfully disobeyed two separate court orders" by not waiting while the court prepared a verdict form and by returning from lunch twenty minutes late. The court imposed a monetary sanction on appellant of $875.00.

Appellant timely appealed the district court's ruling.[4]

DISCUSSION

I. Appellant's Conduct Did Not Violate Local Rule 2.5.2

[1] The record shows that appellant's conduct did not amount to a violation of Local Rule 2.5.2. First, appellant's failure to wait during the evening hours for the court to prepare a verdict form did not interfere with the administration of justice. The jury had departed by 4:30 p.m. and was instructed to return to court the next day. The court waited until 6:00 p.m. before informing appellant and opposing counsel to mark time while it prepared a verdict form. The court did not finish preparing the form until 7:25 p.m.

[2] The appellant did not compromise the administration of justice, nor delay proceedings, by returning the next morning to review and approve the verdict form. This process took five minutes. Moreover, shortly after 9:00 a.m., before the court asked appellant and opposing counsel for comments on the

[3]Local Rules 2.5.2 states: "No attorney shall engage in any conduct which . . . interferes with the administration of justice . . . ."

[4]Appellee, the City of Los Angeles, is not a party to the order imposing sanctions and thus has no interest in the outcome of this appeal.

verdict form, the court heard an intervening criminal matter. Appellant's premature departure from the courthouse the previous evening had no meaningful impact on the proceedings the following morning.

[3] Second, the twenty minute delay caused by the appellant's late return from lunch on January 29, 1989 cannot be deemed an interference with justice. On the afternoon of January 28, 1989, appellant asked the court if he could wait at his office on call, or if his associate could take the verdict for him. The court denied these requests. Instead, the court informed appellant that it would grant a fifteen minute longer than normal lunch break on January 29, 1989, but later failed to do so. Appellant had planned to use the extra fifteen minutes to take care of other pressing business. Appellant's actions, though not condoned, did not impose a grievous delay in the proceedings. Thus, we find that appellant's conduct did not amount to an interference with the administration of justice.

II. Sanction Was Unwarranted

[4] Even if appellant's conduct did amount to a violation of the local rule, the sanction imposed by the district court was unwarranted. Although a district court may sanction an attorney for violating local rules, *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 519 (9th Cir. 1983), there are several limitations on the district court's authority to do so. *See Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989).

A. Sanction Must Be Necessary

[5] First, the sanction must be necessary for the court to "carry out the conduct of its business." *See* 28 U.S.C. §§ 1654, 2071; *Zambrano*, 885 F.2d at 1480 (9th Cir. 1989). The sanction imposed on appellant was not necessary for the

court to conduct its business. The trial concluded without significant delay.

B. Sanction Must Be Proportionate to the Offense

[6] Second, sanctions imposed must be "proportionate to the offense and commensurate with principles of restraint and dignity inherent in judicial power." *Zambrano*, 885 F.2d at 1480. This second factor imposes upon the court the responsibility to consider moderate penalties commensurate with counsel's conduct, always bearing in mind that trials are stressful and place all involved under pressure.

Here, the court did not consider a more moderate penalty before imposing the monetary sanction, nor did it express its displeasure with appellant's conduct the previous evening when appellant failed to wait while the court prepared a verdict form. Had the court informally expressed its displeasure, the problem might have been avoided. Moreover, a sanction of $875.00 is not proportionate to the offensive conduct committed by the appellant. Not waiting for the court to prepare a verdict form after the jury had departed and returning from lunch a few minutes late because of other pressing professional obligations does not warrant such an excessive penalty—especially where there was no interference with the administration of justice, and where a mild rebuke might have sufficed.

C. There Must Be a Finding of Recklessness, Repeated Disregard of Court Rules, Gross Negligence, or Willful Misconduct

[7] Third, there must be conduct amounting to recklessness, repeated disregard of court rules, gross negligence, or willful misconduct before a party or counsel may be sanctioned for violation of local rules. *Zambrano*, 885 F.2d at 1480. Appellant exercised poor judgment by not waiting for the court to prepare a verdict form and by returning from lunch a few

minutes late, but his actions did not amount to the sort of willful misconduct that financial sanctions are designed to punish. The district court's authority to impose sanctions for violation of local rules should be reserved for "serious breaches," not thoughtless conduct. *Zambrano*, 885 F.2d at 1485.[5]

REVERSED

[5]Sanctions would also be inappropriate in this case under the district court's inherent powers to control the courtroom. The district court must make a specific finding that the sanctioned party acted in bad faith before imposing any sanction under the court's inherent powers. *United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986). This was not done here.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HANS H. WEHRLI	)	No. 88-5831
	)	
Plaintiff	)	D.C. No. CV-86-7574-WDK
	)	
vs.	)	
	)	O R D E R
JAMES PAGLIOTTI; CITY OF LOS ANGLES, et al.,	)	
	)	
Defendants - Appellees	)	
	)	
HUGH R. MANES, Esq.,	)	
	)	
Real-party-in-interest - Appellant.	)	

Filed: November 5, 1991
Before: GOODWIN, PREGERSON, AND ALARCON, Circuit Judges.

Upon reconsideration, a thorough examination of the record has disclosed an abundance of material that was not included in appellant's brief. Unfortunately, appellees filed no opposition brief nor any

other papers before this court to assist us in deciding this matter.

After reviewing the record, particularly the transcripts, we conclude that the district judge exercised commendable restraint in dealing withcounsel for both parties. The record establishes that counsel failed to provide the court with the assistance on jury instructions and special verdict forms that judges would normally expect from counsel.

We also conclude that the district court's factual findings regarding the sanctions imposed were not clearly erroneous. Accordingly, the opinion filed August 1, 1991 is vacated and ordered withdrawn from publication. The district court's judgment imposing sanctions is

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HANS H. WEHRLI Plaintiff vs. JAMES PAGLIOTTI; CITY OF LOS ANGLES, et al., Defendants - Appellees HUGH R. MANES, Esq., Real-party-in-interest - Appellant.	No. 88-5831 O R D E R

FILED
FEB - 3 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Before: GOODWIN, PREGERSON, AND ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc

hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.